

AUSTRALIA / JUDGMENT

Marshall v O'Flaherty [2022] NSWDC 502

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District Court New South Wales

Medium Neutral Citation: Marshall v O'Flaherty [2022] NSWDC 502 Hearing dates: 22 April 2022
Date of orders: 25 October 2022 Decision date: 25 October 2022 Jurisdiction: Civil Before: P Taylor
SC DCJ Decision: (1) Make orders 1 and 2 of the Amended Summons filed 4 February 2022.

- (2) Dismiss the defendant's notice of motion dated 25 March 2022.
- (3) Order costs be costs in the proceedings.
- (4) Grant liberty to either party to make application to the list judge within two weeks in respect of order (3). Catchwords: TRAFFIC LAW AND TRANSPORT — Traffic law — Motor accident legislation — Time limits CONSTITUTIONAL LAW — The Judiciary — Federal jurisdiction — Diversity jurisdiction Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), s 34B Commonwealth Constitution, Ch III, s 75(iv), s 77, s 109 Interpretation Act 1987 (NSW), s 31, s 34B Judiciary Act 1903 (Cth), s 39 Motor Accidents Compensation Act 1999, s 66, s 109 Personal Injury Commission Act 2020, s 24, s 26, s 27, s 28 Cases Cited: Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe (1922) 31 CLR 290 Burns v Corbett; Burns v Gaynor; Attorney General for NSW v Burns; Attorney General for NSW v Burns; NSW v Burns (2018) 265 CLR 304; [2018] HCA 15 Condon v Bartley; Hayes v RACQ Insurance Limited; Smith v Allianz Australia Insurance Ltd; Ward v QBE Insurance (Australia) Ltd; Hackett v Allianz Australia Insurance Ltd [2022] NSWDC 282 Crouch v Commissioner for Railways (Qld) (1985) 62 ALR 1 Eades v Gunestepe [2012] NSWCA 204 Nominal Defendant v Browne [2013] NSWCA 197 Rahman v Al-Maharmeh [2021] NSWCA 31 Smith v Grant [2006] NSWCA 244 Walker v Howard [2009] NSWCA 408 Category: Principal judgment Parties: Phillip Kenneth Marshall (plaintiff) Thomas O'Flaherty (defendant) Representation: Counsel: Mr B Jones (plaintiff) Mr J Turnbull SC (defendant)

Solicitors: Stacks Goudkamp (plaintiff) Carroll & O'Dea Lawyers (defendant) File Number(s):
2021/00350695 Publication restriction: None

Judgment

Introduction

1. Phillip Marshall was injured in a motor vehicle accident near Grafton, New South Wales on 3 March 2016 involving a car driven by the defendant, Thomas O'Flaherty. On 29 July 2016 Mr O'Flaherty's insurer admitted liability (duty, breach and some damage) for Mr Marshall's claim.
2. On 10 December 2021 Mr Marshall sought leave to commence proceedings against Mr O'Flaherty in the District Court. On 4 February 2022 he filed an Amended Summons seeking, in addition, leave to commence proceedings out of time.

Issues

1. Leave to commence proceedings in the District Court is available under s 26 of the Personal Injury Commission Act 2020. Section 26(3) provides, relevantly, that the Court may grant the leave if: "(a) an application was first made to the President or Commission, and
 - (b) the determination of the matter by the usual decision-maker would involve an exercise of federal jurisdiction, and
 - (c) the [President or Commission] would otherwise have had jurisdiction ... to determine the application."
1. It seems clear enough, and was not disputed by the parties, that the reference to "otherwise" in para 3(c) is to be read as "in the event that the matter did not involve an exercise of federal jurisdiction".
2. The defendant submitted that an application was not first made to the President or Commission under para 3(a), because "the plaintiff has not complied with the necessary pre-filing requirements of the PIC Act [and says] this [is] fatal to the plaintiff's application". [1] The plaintiff did not dispute the need for satisfaction of s 26(3)(a) in order for the Court to have power to grant leave. Whether para 3(a) is satisfied is thus the first issue in the proceedings.
3. Leave to commence proceedings out of time under s 109 of the Motor Accidents Compensation Act 1999 is not available unless the claimant provides a full and satisfactory explanation for the delay, and the total damages likely to be awarded exceeds the threshold provided in s 109(3).
4. Whether these aspects of s 109(3) – a full explanation, a satisfactory explanation, and likely damages exceeding the threshold – are satisfied are also issues in the proceedings.

Background to s 26 of the Personal Injury Commission Act 2020

1. Mr Marshall and Mr O'Flaherty are residents of different states. Pursuant to s 75(iv) of the Australian Constitution, the High Court has "original jurisdiction" in "all matters...between residents of different States", a matter implicitly defined to be within the ambit of "federal jurisdiction" by s 77(iii) of the Constitution. That same provision empowers the Commonwealth Parliament to invest federal jurisdiction in "any court of a State", and the Parliament did so by enacting s 39(2) of the Judiciary Act 1903 (Cth).
2. Unless the Personal Injury Commission ("PIC") is a "court of a State", it cannot exercise federal jurisdiction, and in particular, the diversity jurisdiction identified in s 75(iv). This principle was confirmed by the High Court in *Burns v Corbett* [2] in respect of the jurisdiction of the New South Wales Civil and Administrative Tribunal ("NCAT"), where the High Court determined both that s 75(iv) of the Constitution precludes a State from conferring federal diversity jurisdiction on a tribunal which is not a court of a State, [3] and also (unanimously) that for a State to confer federal jurisdiction other than on a court would be inconsistent with s 39(2) of the Judiciary Act, and therefore invalid by operation of s 109 of the Constitution.
3. In *Burns v Corbett*, provisions of the Civil and Administrative Tribunal Act 2013 (NSW) were read down pursuant to s 31 of the Interpretation Act 1987 (NSW) to not exceed legislature power by an enactment otherwise inconsistent with the Constitution and the Judiciary Act.
4. The parties accept that the PIC is, like NCAT, [4] not a court within the meaning of Chapter III of the Constitution, and thus cannot exercise the diversity jurisdiction in s 75(iv) of the Constitution. The Personal Injury Commission Act provides for the Commission to have a broad jurisdiction in respect of disputes involving personal injury. [5] Sections 26 to 28 of the Act were enacted to deal with the federal jurisdiction limitations mentioned, and in particular, the diversity jurisdiction.
5. A question arises as to whether the Court should look at the defendant, or the defendant's insurer, in determining whether the matter involves the exercise of federal jurisdiction. A corporation is not a "resident of a State", [6] but federal jurisdiction embraces not only matters between residents of different states but also matters between a state and a resident of another state. [7] Thus, the answer to the question whether a matter involves federal jurisdiction may be informed by whether the insurer is relevantly "the State".
6. In *Condon v Bartley*, [8] Wilson SC DCJ stated at [45]-[46]: "Three States have a single government-owned and government-controlled CTP insurer:
 - (1) Victoria – The Transport Accident Commission (TAC);
 - (2) Tasmania - The Motor Accident Insurance Board (MAIB);
 - (3) Western Australia - The Insurance Commission of Western Australia (ICWA). There is no dispute that these three entities are relevantly their respective 'States'. The issue was not disputed before and accepted by the High Court in *Sweedman v Transport Accident Commission* [2006] HCA 8. Claims for damages in relation to a motor accident in New South

Wales by residents of any Australian State against one of these three 'government insurers' will give rise to federal jurisdiction except where the claimant is resident in the same State as the insurer. For example, a Victorian claimant against TAC."

1. Here the claimant is a resident of Queensland and the CTP insurer of the defendant's vehicle is the Transport Accident Commission ("TAC"), the Victorian Government-owned insurer. The defendant is also a Victorian resident. There is no dispute that this matter involves the exercise of federal jurisdiction, and there is no need to determine whether the matter is relevantly between residents of different states or alternatively, between a state and a resident of another state.

Section 26 of the Personal Injury Commission Act 2020

1. Section 26 of the Personal Injury Commission Act 2020 provides: "26 Applications involving federal jurisdiction may be made to District Court
 - (1) A person with standing to apply to the President or the Commission for a matter concerning a compensation claim to be determined by the usual decision-maker (a compensation matter application) may, with the leave of the District Court, make the application to the Court instead of the President or Commission.
 - (2) The regulations may make provision for or with respect to—
 - (a) who has standing to make an application for leave, and
 - (b) excluding or including applications as compensation matter applications.
 - (3) The District Court may grant leave for a compensation matter application to be made to the Court only if it is satisfied that—
 - (a) an application was first made to the President or Commission, and
 - (b) the determination of the matter by the usual decision-maker would involve an exercise of federal jurisdiction, and
 - (c) the usual decision-maker would otherwise have had jurisdiction enabling the decision-maker to determine the application.
 - (4) An application for leave must be—
 - (a) filed with the District Court along with—
 - (i) an application that has been completed in the form and manner required under this Act or enabling legislation for the kind of compensation matter application concerned, and (ii) if the parties to the compensation matter application have reached a settlement before leave is sought using a resolution process provided under this Act or enabling legislation—a copy of the terms of settlement, and

- (b) accompanied by the applicable fee (if any) payable for the compensation matter application unless it has already been paid.
- (5) The District Court may—
 - (a) remit a compensation matter application for determination by the usual decision-maker if the Court is satisfied that the usual decision-maker has jurisdiction to determine it, and
 - (b) do so instead of granting leave or after granting leave.
- (6) If the District Court remits a compensation matter application to be dealt with by the usual decision-maker, the Court may make such orders that it considers appropriate to facilitate the determination of the application by the decision-maker.
- (7) The usual decision-maker is to determine any compensation matter application that is remitted to the decision-maker in accordance with any orders made by the District Court."
- 1. These provisions largely replicate those introduced into NCAT as a result of the Burns v Corbett decision. [9]
- 2. Under s 26(3), in general terms, this Court can only grant the leave sought by Mr Marshall if:
 - 1. an application is first made to the PIC; and
 - 2. the determination of the matter would involve the exercise of federal jurisdiction;
 - 3. but otherwise the PIC would have jurisdiction to determine the matter.
- 1. In addition, s 26(4) requires that: (d) the application to the District Court be accompanied by an application in the manner and form of a PIC application.
- 2. Of these four prerequisites for leave, only the first is in issue. Mr O'Flaherty asserts that an application was not "first made to the Personal Injury Commission".

Was an application first made to the Commission?

- 1. The defendant asserts that the plaintiff has not "first made an application to the PIC [Personal Injuries Commission]" [10] because, although two applications were made, the first "was defective and dismissed", [11] and the second "was not lodged until 7 February 2022", [12] and thus not "before this Court is able to grant leave". [13]
- 2. Although the second application to the PIC was made after these proceedings were commenced, that is not fatal to the application for leave. The plaintiff's written submissions indicated, correctly, that the application to the PIC must be made before leave is granted. That does not require an application to the PIC before an application for leave is filed. There is no dispute that such an application to the PIC has now been made, before I have granted leave. Thus, the pre-requisite is satisfied, and in that event, I need not consider whether the earlier dismissed application satisfies s 26(3)(a).

Was the application under s 109 of the Motor Accidents Compensation Act 1999 "full"?

1. Section 109 of the Motor Accidents Compensation Act provides for a three-year limitation period from the date of the motor vehicle accident. The accident occurred on 3 March 2016. The parties accept that because "the claim [was] referred to the State Insurance Regulatory Authority...now the PIC", [14] the three-year time limit expired on 14 October 2019.
2. The full account of the delay required by s 109 involves "a full account of the conduct, including the actions, knowledge and belief of the claimant, from the date of the accident until the date of providing the explanation". [15] That "explanation may not be 'full' if it does not provide some detail as to the instructions given to, and the advice received from, solicitors". [16]
3. The defendant places particular emphasis on the contact with solicitors which the plaintiff first had on 21 April 2016, [17] including with Ruth Hudson, Victoria Roy and Brett Watts. He submits that the Court knows nothing of the advice given by those solicitors to the plaintiff.
4. However, the need for a "full account" only requires material to be included if that material is relevant to the delay. Young JA in *Walker v Howard* [18] at [133] specified the need to include evidence of the conduct of others "if relevant".
5. Principally, it is the conduct of Mr Marshall that is relevant. [19] Here, there is no evidence that Mr Marshall received advice relevant to the delay from any of his former solicitors, and it is implied that none was given. Mr Marshall said of his current solicitor, Ms Yousef of Stacks Goudkamp: "34. On 29 November 2018 I had a telephone conversation with Ms Yousef...
35. Ms Yousef explained the limitation period under the Motor Accident Compensation Act 1999 (NSW) to me.
36. Ms Yousef explained the implications associated with not lodging an application with the Claims and Resolution Service before the expiry of the three-year limitation period.
37. Ms Yousef explained that one exception to a claim being assessed when the application is lodged is if injuries have not sufficiently recovered. I thought that as long as I gave all the information to Stacks Goudkamp that they needed the time limits would be followed or that if I was still having problems it would not even be an issue.
38. On 4 December 2018 I spoke to Ms Yousef providing her with an update...on my injuries...
39. Ms Yousef referred to our previous conversation regarding the three-year limitation period and informed me that the need for surgery and the deterioration of my conditions means that my condition has not yet sufficiently recovered. ...

55. On 24 April 2019 I spoke to Ms Yousef. Ms Yousef confirmed that she lodged the application for assessment with the Claims Assessment and Resolution Service. She told me that the insurer had lodged its reply and she was waiting for the Claims Assessment and Resolution Service to decide how the application would proceed. She instructed me to keep her up to date with any developments in my medical treatment. Ms Yousef told me it is not appropriate to try and settle my claim until it was clear what was happening to my knee." [20]
1. Accordingly, as Mr Marshall explained, he was told of the limitation period almost a year before it expired, and had further discussions in the months thereafter. In those circumstances, the relevance of earlier conversations with solicitors about the limitation period is not easy to discern.
 2. There was no challenge to Mr Marshall's evidence. In those circumstances, I infer that he first understood relevant things pertaining to the limitation period from the advice of Ms Yousef. Had Mr Marshall been advised earlier, it would be of little significance since he certainly understood the time limitation almost 11 months before the limitation period expired. If the defendant wished to support a submission that relevant matters about the limitation period were said to Mr Marshall years before, but not included in his affidavit, he needed to at least put a proposition to that effect to Mr Marshall, or otherwise establish this. I do not accept that conversations with former solicitors needed to be included where there is no evidence or material indicating the relevance of those conversations, and Mr Marshall himself was not asked about them.
 3. The defendant submitted that it "frankly beggars belief that he was not told about the time limits applicable to the matter". [21] I do not accept this is so. Where a meeting with solicitors occurred years before the time limit was to expire, it would be unnecessary and could be unhelpful to give advice about them. In any event, it is not relevant in this case as the explanation for the delay in failing to comply with the limitation period in s 109, which is the nature of the "delay" spoken of in s 109(3)(a), includes a concession that Mr Marshall knew of the time limit well in advance of its expiry. Sometimes the claimant's understanding about the limitation period soon after the accident will be relevant to an explanation of that delay, as s 66 indicates. That is not such a case.
 4. This is the primary challenge to the plaintiff's application for leave. Once it is dismissed, no further argument was put about the satisfactoriness of the explanation, or the monetary threshold.
 5. In my view, informed also by the defendant's concession, it was reasonable of the plaintiff to rely on his solicitors in respect of the limitation period and the impact of his unstable injuries, and thus, a reasonable person in his position would have been justified in experiencing the same delay, the test of a satisfactory explanation in s 66 of the Motor Accidents Compensation Act.

6. The relevant threshold in question is \$127,750, being 25% of \$511,000. The MAS certificate confirms a greater than 10% whole person impairment. [22] Thus, the plaintiff will likely be awarded substantial damages for non-economic loss, to which medical expenses, [23] expenses of care, [24] and lost remuneration from employment, [25] must be added. In the absence of any challenge to the matters, I am satisfied that the threshold is satisfied.
7. There is no need to deal with the plaintiff's further argument about estoppel.

Conclusion

1. Accordingly, I find that the requirements for an extension of time under s 109 of the Motor Accidents Compensation Act are satisfied. In addition, because the matter involves federal diversity jurisdiction, the additional requirements of s 26 of the Personal Injury Commission Act arise, and are, in my judgment, satisfied. I grant the leave sought in the motion.
2. There was no request for further orders under s 27 of the Personal Injury Commission Act, and so the occasion for such orders has not yet arisen.

Orders

1. The orders of the Court are:
 1. Make orders 1 and 2 of the Amended Summons filed 4 February 2022
 2. Dismiss the defendant's notice of motion dated 25 March 2022.
 3. Order costs be costs in the proceedings.
 4. Grant liberty to either party to make application to the list judge within two weeks in respect of order (3).

Endnotes

1. Defendant's Outline of Submissions ("DOOS") at [4].
2. Burns v Corbett; Burns v Gaynor; Attorney General for NSW v Burns; Attorney General for NSW v Burns; NSW v Burns (2018) 265 CLR 304; [2018] HCA 15.
3. By a majority comprising Kiefel CJ, Bell, Gageler and Keane JJ at [2], [4], [43]-[45].
4. Burns v Corbett at [39].
5. See Personal Injury Commission Act 2020, s 24.
6. Crouch v Commissioner for Railways (Qld) (1985) 62 ALR 1 at 9-10, Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe (1922) 31 CLR 290.
7. See Constitution, ss 75(iv) and 77.

8. Condon v Bartley; Hayes v RACQ Insurance Limited; Smith v Allianz Australia Insurance Ltd; Ward v QBE Insurance (Australia) Ltd; Hackett v Allianz Australia Insurance Ltd [2022] NSWDC 282.
9. See e.g. s 34B of the Civil and Administrative Tribunal Act 2013 (NSW).
10. DOOS at [13]-[18].
11. DOOS at [15].
12. DOOS at [16].
13. DOOS at [17], emphasis in original.
14. DOOS at [19].
15. Motor Accidents Compensation Act 1999, s 66(2).
16. Nominal Defendant v Browne [2013] NSWCA 197 at [21] per Basten JA.
17. Affidavit, Phillip Marshall, 10 March 2022, at [9].
18. [2009] NSWCA 408.
19. Smith v Grant [2006] NSWCA 244 at [32]-[33], see also Rahman v Al-Maharmeh [2021] NSWCA 31 at [39] and [42], and the terms of s 66(2) of the Motor Accidents Compensation Act.
20. Affidavit, Phillip Marshall, 10 March 2022 at [34]-[55].
21. DOOS at [33].
22. Cf Eades v Gunestepe [2012] NSWCA 204.
23. See affidavit, Thomas Goudkamp, 8 March 2022, Annexure C at p 18.8, see also p 148.
24. Ibid, Annexure C at p 19.
25. See affidavit, Thomas Goudkamp, 8 March 2022, Annexure A at p 10, Q44; Annexure C at p 17.3. DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated. Decision last updated: 25 October 2022

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Prepared on 29 October 2026 · Esheria